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IN THE

Supreme Court of the United States

October Term 1948

CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL, DANIEL RODRIGUES FERREIRA, YUTAKA GOHARA, CORNEL IHA, MASASHI KAGEYAMA, TOROICHI KANDA, FRANK GONSALVES PEREIRA, NOBORU TAKEUCHI, FRED TANIGUCHI and GENKICHI WADA,

Petitioners,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii, and WALTER D. ACKERMAN, JR., as Attorney General of the Territory of Hawaii,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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vs.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Constancio R. Alesna, Jose Bagogo Bernal, Daniel Rodrigues Ferreira, Yutaka Gohara, Cornel Iha, Masashi Kageyama, Toroichi Kanda, Frank Gonsalves Perreira, Noboru Takeuchi, Fred Taniguchi and Genkichi Wada respectfully allege:

A

SUMMARY STATEMENT OF MATTER INVOLVED

Petitioners are workers employed by several sugar plantations on the Island of Kauai, Territory of Hawaii, and are members of various local affiliates of the International Longshoremen's and Warehousemen's Union, a trade union.

Petitioners brought this action under the Civil Rights Act (8 U.S.C., Section 43) and Section 41 (14) of Title 28,[1] alleging upon four different grounds a deprivation, under color of territorial law, of rights, privileges and immunities secured by the Constitution of the United States and of rights secured by laws of the United States.[2]

FACTS

Factually, the background of the case is as follows:

In September, 1946, there was a strike in progress against the Lihue Plantation Company, Limited, a sugar plantation on the Island of Kauai in the Territory of Hawaii, called by the recognized exclusive bargaining representative of its employees, Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union, CIO. After the strike had been in progress seventeen days, on September 17, the Lihue Plantation Company applied to the respondent judge for an ex parte restraining order. The respondent judge issued a restraining order in the form

[1] Now 28 U.S.C., Section 1344 (3).

[2] Petitioners' complaint for injunction was in four counts (R. 5). The first three counts allege a deprivation of rights under the Norris-LaGuardia and Clayton Acts. The legal issues in the first three counts of the complaint are presented in *ILWU v. Wirtz*, 37 Haw. 404, affirmed 170 F. 2d 183, certiorari denied in No. 510 in the records of this court on February 28, 1948, petition for rehearing pending. This petition is directed only to count four of petitioners' complaint, which is based squarely on the deprivation of rights guaranteed by the First Amendment to the Constitution (R. 514).

requested by the company. The order restrained the International Longshoremen's and Warehousemen's Union, CIO;[3] Local 149 of said Union, which includes the employees of almost all the sugar plantations on the Island of Kauai; Unit 1 of Local 149, which includes the employees of Lihue Plantation Company; the individual officers of Unit 1 of Local 149; and unspecified John and Mary Does and Roes.

Thereafter on September 20, the above-named defendants in the equity action in the territorial circuit court moved to dissolve the ex parte restraining order on the grounds that the order issued violated the constitutional rights of the persons restrained, and that the court was without jurisdiction to issue it without complying with the provisions of the Norris-LaGuardia Act (R. 191). The respondent judge denied the motion. On September 23, 1946, on his own motion, he amended the restraining order and deleted therefrom restraints not requested by the petition of the Lihue Plantation Company (R. 196-197).

Insofar as here relevant, the ex parte restraining order, as amended, prohibited the above-named defendants in the equity action in the territorial court

> . . . until further order of this Court from *in any way* . . .
>
> (7) Mass picketing by assembling in compact groups or congregating in crowds on or near real property of the petitioner, whether used for business or residence purposes, to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property by petitioner, any of its employees, or any other persons lawfully seeking to enter or leave any of said real property;
>
> And in Furtherance Hereof, you are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets in a group at any point

[3] A trade union with 30,000 members, in the Territory.

> and station when stationed at points of ingress to and egress from the petitioner's property, provided, however, that any pickets in excess of three (3) at any one point and station, shall be in motion, and, except when passing each other, shall maintain a distance of not less than ten (10) feet between each other . . . and all pickets being also enjoined from *otherwise committing* any of the acts hereinabove prohibited. (R. 41, 45-46.)

Petitioners were indicted by the grand jury of the County of Kauai for unlawfully, feloniously and wilfully engaging in mass picketing and assembling with others, and congregating in crowds and for engaging in picketing with others in groups of more than three, in violation of these provisions of this allegedly lawful ex parte amended restraining order prohibiting such conduct (R. 18, 32).[4]

None of the petitioners were named in the territorial equity action and most of them are not employees of the Lihue Plantation Company nor members of the unit representing its employees. No conduct of the petitioners was complained of by the Lihue Plantation Company when it sought this ex parte order against the defendants in the equity suit. No copies of the order were ever served on petitioners. No fraud or violence is charged against the petitioners by the indictment—merely that they engaged in mass picketing and assembling with others and congregated in crowds of more than three, not being in motion.

Geographically, the scope of the ex parte order encompasses "on or near the real property of the Lihue Plantation Company, whether used for business or residence pur-

---

[4] The indictment is in two counts. The first count alleges a violation of paragraph 7 of the amended restraining order, and the second count, a violation of the in furtherance clause. No violation of any other provisions of the order are charged in the indictment. The information for summary contempt later substituted for the indictment likewise charges a violation of these provisions only (R. 355, 357).

poses." This includes 12,000 acres of land on the Island of Kauai, twenty company towns and camps in which the employees and their families live, miles of privately owned, but publicly used, roads and public highways and streets (R. 329).

Petitioners showed that the respondent judge had set the criminal contempt proceedings on his calendar for plea, and had informed them that he intended to proceed forthwith to try the petitioners.[5] They alleged that the respondents had already deprived them of rights of free speech and assembly and due process of law guaranteed by the Constitution, and had already violated their constitutional rights, and that unless restrained, respondents would proceed to prosecute and try petitioners for criminal contempt for alleged violations of the void order solely for engaging in peaceful picketing, and would, unless restrained, continue to deprive plaintiffs of due process and of their rights secured by the Constitution to be free from previous legal restraints or subsequent prosecutions for having engaged, in concert with others, in peaceful picketing and assembly during the course of a labor dispute. Petitioners alleged that they had no adequate remedy at law and showed exceptional circumstances and irreparable injury which they urged entitled them to equitable relief.[6]

---

[5] Petitioners showed the District Court, at the time the complaint was filed, that the respondent judge had refused a stay of the petitioners' trial pending determination by the Court of Appeals for the Ninth Circuit, in *ILWU v. Wirtz*, of the legal issues involved in the first three counts of the complaint, despite the fact that it is customary practice in criminal cases not growing out of labor disputes not to force the taking of more than one appeal on the same issues.

[6] Some of the exceptional circumstances and irreparable injury shown by petitioners in support of the allegations of their complaint are set forth in the opinions of the district court (R. 54, 314, 327-330):

1. That the respondent judge had refused to stay the criminal trial of petitioners while an appeal was being prosecuted involving similar issues.

2. That the respondent judge had already ruled adversely to petitioners' positions on all substantive issues of federal and constitutional law.

3. That the respondents engaged in a course of conduct to oppress and intimidate petitioners and other working men in Hawaii so that they would fear to exercise their rights.

4. That the petitioners were singled out and selected for prosecution under a statute never before invoked pursuant to a plan to intimidate and coerce petitioners and others in the exercise of their rights.

5. That petitioners were so singled out for prosecution from others because they were union officers.

6. That the pendency of the criminal contempt case is an employer weapon to instil fear, spread confusion and to weaken the Union to which petitioners belong and petitioners' rights.

7. That appeals would be costly and of no avail since the Supreme Court in *ILWU v. Wirtz* had ruled adversely to plaintiff's contentions respecting the Norris-LaGuardia Act.

8. That the respondent judge is the legislator, the wronged person, the prosecutor and the executor.

9. That the Territory claims the right under the *Lewis* case to punish for contempt of an order void because it violates rights guaranteed by the First Amendment.

10. That the amended restraining order violates substantive federal rights under the Clayton and Norris-LaGuardia Acts.

11. That the amended restraining order is void on its face and in violation of rights guaranteed by the First Amendment in that:
    a. It constitutes unjustifiable previous restraint upon petitioners' rights of free speech and of assembly.
    b. It narrowly and unreasonably circumscribes these rights at the very time when they are of most value and does so without due regard for the size and scope of the industrial conflict involving 100,000 I.L.W.U. members, 12,000 acres of land and twenty company towns and villages.
    c. The order is vague, ambiguous and confusing and places the risk of contempt unjustly upon pickets to determine just what it means.

In the course of argument and briefs, other offers of proof were made of exceptional circumstances and irreparable injury.

OPINIONS OF DISTRICT COURT

Upon application, and in accord with 28 U.S.C., Section 381, and Rule 65 of the Federal Rules of Civil Procedure, a temporary restraining order was issued against the respondent attorney general, his agents and deputies, and an order to show cause was issued against the respondents by the District Judge. On February 20, 1947, after extended argument on the order to show cause, a preliminary injunction to remain in effect pending hearing on the merits was issued by the District Court. The opinion of the District Court is reported in 69 F. Supp. 897 (R. 54-66). In issuing the injunction *pendente lite*, the District Court stated:

> However, in this case, and with reference to the facts alleged and the law involved in the plaintiffs' third and fourth causes of action, a preliminary injunction should and therefore will issue.
>
> . . . .
>
> Where exceptional circumstances of peculiar urgency are shown to exist, a Federal court may interfere with a State court or Territorial court for the purpose of inquiring whether or not a person is being held in violation of the Constitution and laws of the United States. . . .
>
> Now, should—or more pointedly—why should a preliminary injunction issue? Because in the absence of any Territorial law, and in the light of the definite Federal laws relating to permissible labor conduct—which laws the Territorial courts, too, must respect—there seems here to be a substantial question as to whether or not that which under Federal law may be allowable conduct can—by restrictions placed thereon by a court, however reasonable they might be — become, as the Supreme Court says, "the road to prison." (See *U. S. vs. Hutcheson*, 312 U.S. 219; *Thornhill vs. Alabama*, 310 U.S. 88; *Hague vs. CIO*, 307 U.S. 507.) In brief, with no questions of Territorial law involved at all, it looks as if Plaintiffs are in jeopardy because they did things which Federal law allowed.

Ten months later, on December 22, 1947—after numerous extensions of time granted with the approval of the court to the respondents, and after permitting the Hawaii Employers' Council to intervene as amicus curiae at the request of the respondents and over the objection of petitioners, and without permitting petitioners to be heard on the merits—the District Court dissolved the preliminary injunction and directed summary judgment on the merits of the respondents. The opinion of the court is reported in 74 F. Supp. 865 (R. 314-340).

OPINION OF COURT OF APPEALS

The Court of Appeals sustained the judgment of dismissal, but held that the District Court erred in granting summary judgment without hearing on the merits. Its decision is set forth at pages 384-391 of the Record. The Court of Appeals held that the complaint did not set forth a claim on which equitable relief should be granted, and hence, that petitioners were not entitled to a hearing on the merits.[7] It indicated that petitioners might have raised the constitutional questions in a Writ of Prohibition proceeding in the Territorial Supreme Court, and hence, by inference could not elect to proceed under the Civil Rights Act.[8]

---

[7] The Court of Appeals erroneously assumes that petitioners do not contend that these criminal prosecutions are not in good faith. Their complaint is that they have been deprived of rights guaranteed by the laws on Constitution of the United States, and they seek redress from the federal court because they have been injured, oppressed and intimidated in the exercise of those rights. Petitioners contend this is a matter of proof, to be determined on a hearing on the merits. In the District Court, the petitioners, the respondents, and the court proceeded, as is apparent from the record, on the assumption that the complaint for injunction raised the issue of exceptional circumstances and criminal prosecutions brought in bad faith.

B

JURISDICTION

This court's jurisdiction to grant this petition rests on the Act of June 25, 1948, 62 Stat. ....., 28 U.S.C., Section 1245 (1), which provides that cases in the courts of appeals may be reviewed by writ of certiorari granted upon petition of any party to any civil or criminal case before or after rendition of judgment or decree.

C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The issues raised by this petition are grounded upon the First and Fifth Amendments of the United States Constitution. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment,[9] so far as here relevant, provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

---

[8] In *ILWU v. Wirtz*, supra, referred to by the Court of Appeals in the decision, the appellants there raised, both in the Supreme Court of Hawaii and the Court of Appeals, the issue that the ex parte order there involved was issued without jurisdiction, because on its face it collided with the First Amendment, but neither court ruled on this contention.

[9] Paragraph V, count four of petitioners' complaint, erroneously alleges a deprivation of the due process clause of the Fourteenth Amendment, which applies to states, while the Fifth applies to territories.

D

QUESTION PRESENTED

Have petitioners been deprived of their constitutional rights of free speech and assembly, and of due process of law, by respondents under color of territorial law by the issuance of the amended restraining order prohibiting peaceful picketing and assembly, and by the prosecution against them for engaging in peaceful picketing and assembly, and are they entitled to a hearing on the merits of their complaint?

E

REASONS RELIED ON FOR THE GRANTING OF THE WRIT

Issues of far-reaching importance to every working man and woman in the Territory of Hawaii, indeed to all the residents of the territories and possessions of the United States, are presented. Petitioners are threatened with being tried criminally for engaging in peaceful picketing and peaceable assembly. The decision below sanctions the action of a territorial circuit court judge in prohibiting in ex parte proceedings peaceful picketing and so narrowly circumscribing as to render meaningless the rights of free speech and assembly guaranteed by the First Amendment.

I

In the Territory of Hawaii, Congress has seen fit to exercise its power conferred by Article IV of the Constitution by legislating directly in part and in part by delegating legislative power to the territorial legislature, and by creating legislative courts to exercise judicial power. Both the power of the legislature and the power of the courts are to be exercised in a manner consistent with the Constitution and laws of the United States. Congress delegated to the

territorial legislature, and certainly to the territorial courts no greater power than it had under the Constitution. Even Congress could not, consistent with the First Amendment, abrogate and abridge the exercise of the rights of free speech and assembly or provide that only three persons could exercise these rights in concert. Yet the Court of Appeals has in effect sanctioned such an ex parte order issued by the respondent judge, in defiance of applicable decision of this Court. Thus, the exercise of arbitrary power by the territorial circuit court judges over free speech and assembly, denied to Congress by the First Amendment, is sanctioned.

II

This Court, in *United States v. Screws,* 325 U.S. 91, said:

> The specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by express terms of the Constitution or laws of the United States or by decisions interpreting them. Take the case of a local officer who persists in enforcing a type of ordinance which the court has held invalid as violative of the guarantees of free speech or freedom of worship. Or a local official continues to select juries in a manner which flies in the teeth of decisions of this court. If those acts are done wilfully, how can the officer possibly claim that he had no fair warning that his acts were prohibited by the statute? He violates the statute not merely because he has a bad purpose, but because he acts in defiance of announced rules of law. He who defies a decision interpreting the constitution knows precisely what he is doing.

Petitioners believe that the respondent judge, in issuing the ex parte order, acted in defiance of, and in flagrant violation of decisions of this Court defining the rights of free speech and assembly.

III

The amended restraining order issued by the respondent judge, and the prosecution of the petitioners for contempt of this order, is in violation of their right of free speech under the First Amendment as that right was defined by this Court in *Thornhill v. Alabama,* 310 U.S. 88. The order so narrowly circumscribes these rights by defining "mass picketing" as "three" that the substance of the right is destroyed. The proscription of the amended restraining order and the charge under it prohibits the overt act of peaceably assembling, and under the guise of regulation of "picketing en masse," conduct well within the bounds of peaceful picketing is proscribed. The mere invocation of the words "picketing en masse" cannot justify any restraint on free speech and assembly which a corporation asks for or a territorial circuit court judge sees fit to impose. This order does not meet the clear and present danger test; it does not even meet the test of reasonableness, assuming territorial courts can exercise police power.

IV

The amended restraining order issued by the respondent judge, and the prosecution of the petitioners for contempt of this order is in violation of the principle declared by this court in *Marsh v. Alabama,* 326 U.S. 501, that the fundamental rights of free speech and assembly occupy a preferred position in our scheme of government over property rights. This principle has been mutilated on the slender ground of a corporation's mere ex parte assertion that its property rights will be injured. On this ground, the means of free communication of petitioners and of hundreds of people living in company towns on the Island of Kauai have been denied, and fundamental rights of individuals to free speech and assembly have been hacked to size to meet the demands of a corporation.

V

The amended temporary restraining order must be judged on its face to determine whether petitioners have been deprived of rights guaranteed by the First Amendment. (*American Federation of Labor v. Swing*, 312 U.S. 287; *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287.) Petitioners have been charged under only those provisions of the order which prohibit mass picketing and congregating in crowds defined as three. Conviction on a charge not made would be a denial of due process. (*Cole v. Arkansas*, 333 U.S. 196.) When judged on its face, the order and the charge under it, not only conflict with the First Amendment, but are so vague and ambiguous as to constitute a denial of due process.

VI

In *Hague v. Committee for Industrial Organization*, 307 U.S. 496, this Court struck down a city ordinance which required a license from a local official for a public assembly on the streets or highways or in the public parks, although the official was empowered to refuse a permit only if refusal would prevent riots, disturbances or disorderly assemblages. The ex parte order, prohibiting as it does lawful, peaceful picketing and assembly, is the equivalent of licensing of the dissemination of facts in a labor dispute. Petitioners' complaint sets forth a cause of action within the principle of the *Hague* case and the rules laid down in *Douglas v. Jeannette*, 319 U.S. 157. Petitioners on the showing made and on their complaint were entitled to a hearing on the merits to prove their deprivation of rights, exceptional circumstances and that the criminal prosecutions were in bad faith. Grave questions of constitutional law and of deprivation of rights were raised by the complaint. This court has held

that it is inexpedient to determine such questions upon a demurrer to a complaint, or upon an equivalent motion if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer. (See Concurring Opinion of Justice Stone and Justice Cardozo, *Borden's Co. v. Baldwin*, 293 U.S. 194, 213.)

WHEREFORE, your petitioners pray that a writ of certiorari issue out of this Court to the Court of Appeals for the Ninth Circuit; that the order of the Circuit Court of Appeals be reviewed and determined by this Court, and the order finally reversed; and that your petitioners be granted such other and further relief as may be proper.

Respectfully submitted,

CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL, DANIEL RODRIGUES FERREIRA, YUTAKA GOHARA, CORNEL IHA, MASASHI KAGEYAMA, TOROICHI KANDA, FRANK GONSALVES PEREIRA, NOBORU TAKEUCHI, FRED TANIGUCHI and GENKICHI WADA,

By GLADSTEIN, ANDERSEN, RESNER & SAWYER,

By HERBERT RESNER,
Attorneys for Petitioners.

BOUSLOG & SYMONDS
By HARRIET BOUSLOG,
Of Counsel.

Dated: April 7, 1949.

No. .....

IN THE

Supreme Court of the United States

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Petitioners,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii, and WALTER D. ACKERMAN, JR., as Attorney General of the Territory of Hawaii,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Theory of Petitioners' Complaint for Injunction.

Petitioners' complaint alleges that the respondents, acting under color of territorial law, had deprived them, and were threatening to continue to deprive them of rights guaranteed by the First Amendment to the Constitution. The issue raised by the complaint is that petitioners were being prosecuted under an indictment which charged them with feloniously violating an ex parte restraining order enjoin-

ing conduct which the First Amendment guarantees them a right to engage in.[1]

Only the indictment and the provisions of the amended ex parte restraining order alleged to be violated are relevant in determining what the charges against petitioners are and must be judged on their face to determine whether they collide with the guarantees of the First Amendment. Clearly, conviction on a charge not made would be a sheer denial of due process (*Cole v. Arkansas,* 333 U.S. 196).

II. Petitioners' Complaint States a Claim on Which Relief Can Be Granted.

Certainly there can be no doubt of the jurisdiction of federal courts to entertain suits under the Civil Rights Act to restrain criminal prosecutions since this court's decision in *Hague vs. Congress of Industrial Organization,* 307 U.S. 495, and *Douglas vs. Jeannette,* 319 U.S. 161.

But this Court has said that federal courts are not warranted in exercising jurisdiction to restrain the enforcement of unconstitutional statutes—here a void restraining order —or criminal prosecutions under such statutes unless the statute is void on its face and the operation of the statute will cause great and immediate loss to the complainant.

Plaintiffs believe that their complaint shows facts and their showing made on their application for a preliminary injunction—which was once granted and then dissolved by the District Court before hearing on the merits—entitled them to relief under a strict application of this rule. In any event, they have made a showing entitling them to a hearing on the merits.

---

[1] The information for summary criminal contempt substituted for the indictment charges a violation of exactly the same provisions of the amended order, and has the effect of robbing petitioners of a right to a jury trial and of forcing them to stand trial before a judge who has already ruled against their contention of violation of rights guaranteed by the First Amendment (R. 355, 357).

Yet, on a mere motion to dismiss, the Court of Appeals directed that their complaint should be dismissed. The District Court ruled as a matter of law and purportedly on the merits—but without a hearing on the merits—that petitioners' rights were not violated.

This Court has warned against deciding grave constitutional issues on a motion to dismiss or its equivalent. Thus Mr. Justice Cardozo in his concurring opinion in *Borden's Farm Products Company v. Baldwin*, 293 U.S. 194, 213, said:

> We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the question clearer.

See also

Dioguardi v. Durning, 139 F. (2d) 744 (1944);
Burt v. City of New York, 156 F. (2d) 791 (1946), and
Picking v. Pennsylvania, 151 F. (2d) 240 (1945).

It certainly cannot be said as a matter of law that any judge bound by the Constitution of the United States can decree that out of hundreds of farm workers on strike only three can exercise their right to peacefully picket and assemble simultaneously on country roads at points of ingress and egress. Nor can it be said as a matter of law that a judge can make the exercise of the right by such strikers to assemble in groups of more than three conditional on their remaining ten peripatetic feet apart.

The only justification that has been advanced for enjoining peaceful picketing since the outmoding of the lone missionary permitted in the *Tri-City*[2] case is a background of

[2] *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184.

violence flagrant and long continued. It certainly cannot be argued that on an ex parte assertion by an employer of violence in picketing and of irreparable injury an equity judge could issue an order against the general public directing that there be no assembling near this employer's property.

Whether restraints on peaceful picketing are justified—if they can be justified at all—must depend on facts, not law.

Where, as here, peaceful assembly has been enjoined and the engaging in peaceful assembly charged as a crime, appellants are surely entitled to some opportunity to show the facts on which they base their allegations of deprivation of rights guaranteed by federal law and of injury, intimidation and oppression in the exercise of those rights.

III. Petitioners are Entitled to a Hearing on the Merits Under Decision of This Court.

Where the order of an inferior federally-created court is void on its face because it infringes on personal liberties which the First Amendment guarantees to all citizens, any officer who acts under it acts under color of law and in abuse of law. For a federal court to permit the continuance of such an abuse is a denial of the sovereignty of the people. It places the forms of procedure above the substance of rights. It is an abdication of the very function which Congress directed federal courts to correct under the Civil Rights Act. To permit such an intolerable exercise of arbitrary power would quickly destroy respect for federal courts which extoll comity above right.

This Court, in *Lane v. Wilson*, 307 U.S. 268, very logically pointed out that no interpretation is necessary when a statute is void on its face, and hence the necessity of going to state courts first does not apply. (See also *Home Telephone and Telegraph Company v. City of Los Angeles*, 227 U.S. 278.)

This Court sustained jurisdiction in a federal court to strike down the flag salute regulation in *West Virginia v. Barnette,* 319 U.S. 624, and the invalidation of a Louisiana statute which had for its purpose the licensing of the press by the imposition of a gross receipts tax for the privilege of engaging in the newspaper business. *Grosjean v. American Press,* 297 U.S. 233. In *Hague v. CIO,* 307 U.S. 496, this Court held two ordinances void on their faces and restrained their enforcement. In *Douglas vs. Jeannette,* 319 U.S. 157, this Court sustained federal jurisdiction, but withheld the injunctive hand of the court, but granted in *Murdock v. Pennsylvania,* 319 U.S. 105, decided the same day, the relief prayed by the petitioners there.

Petitioners' allegations and showing meet the tests laid down in the *Jeannette* case for the establishment of a cause of action in equity.

The exceptional circumstances and irreparable injury shown before hearing on the merits in the district court, and set forth in its opinion (R. 54, 314, 327-330) are:

1. That the respondent judge had refused to stay the criminal trial of petitions while an appeal was being prosecuted involving similar issues.

2. That the respondent judge had already ruled adversely to petitioners' positions on all substantive issues of federal and constitutional law.

3. That the respondents engaged in a course of conduct to oppress and intimidate petitioners and other working men in Hawaii so that they would fear to exercise their rights.

4. That the petitioners were singled out and selected for prosecution under a statute never before invoked pursuant to a plan to intimidate and coerce petitioners and others in the exercise of their rights.

5. That petitioners were so singled out for prosecution from others because they were union officers.

6. That the pendency of the criminal contempt case is an employer weapon to instil fear, spread confusion and to weaken the Union to which petitioners belong and petitioners' rights.

7. That appeals would be costly and of no avail since the Supreme Court in *ILWU v. Wirtz* had ruled adversely to plaintiff's contentions respecting the Norris-LaGuardia Act.

8. That the respondent judge is the legislator, the wronged person, the prosecutor and the executor.

9. That the Territory claims the right under the *Lewis* case to punish for contempt of an order void because it violates rights guaranteed by the First Amendment.

10. That the amended restraining order violates substantive federal rights under the Clayton and Norris-LaGuardia Acts.

11. That the amended restraining order is void on its face and in violation of rights guaranteed by the First Amendment in that:
    a. It constitutes unjustifiable previous restraint upon petitioners' rights of free speech and of assembly.
    b. It narrowly and unreasonably circumscribes these rights at the very time when they are of most value and does so without due regard for the size and scope of the industrial conflict involving 100,000 I.L.W.U. members, 12,000 acres of land and twenty company towns and villages.
    c. The order is vague, ambiguous and confusing and places the risk of contempt unjustly upon pickets to determine just what it means.

This Court has said that the rule that courts of equity do not ordinarily restrain criminal prosecutions is subject to

an exception when there is a showing that the constitutional questions cannot be as readily determined in the criminal prosecution in state courts. Thus in *Terrace v. Thompson*, 263 U.S. 197, this Court said:

> But the legal remedy must be as complete, practical and efficient as that which equity could afford. Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the federal Constitution where it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the state is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity.

It needs no argument to show that the legal remedy to which petitioners would be remitted is not as complete, practical and efficient as equity affords.

Professor Borchard in his able article, "Challenging Penal Statutes," 52 Yale L. J. 445, says:

> The suggestion that the opportunity of becoming a defendant in a criminal trial is an adequate remedy at law and thus a bar to a bill of injunction is either not advanced at all, or where it is advanced, seems discreditable to the court.
>
> The liability to be tried as a criminal is no 'remedy' but a hazard, which the law should help the much regimented citizen to avoid by construing and interpreting inhibitory statutes in a civil proceeding where possible.

In *Truax v. Raich*, 239 U.S. 33, the plaintiff brought suit against the state attorney general and various other state officials to enjoin enforcement of the Arizona Anti-alien labor law and to restrain criminal prosecution of his em-

ployer under the Act. The application for an interlocutory injunction and the motion to dismiss were heard before a three-judge court.

The motion to dismiss was denied and an interlocutory injunction restraining the defendants from enforcing the Act was granted. This Court said:

> As the bill was framed upon the theory that the Act is unconstitutional and that the defendants who are public officers concerned with the enforcement of the laws of the state are about to proceed wrongfully to the complainants' injury with his employment, it is established that the suit cannot be regarded as one against the state.
>
> It is also settled that while a court of equity, generally speaking, has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments when the prevention of such prosecutions is essential to the safeguarding of rights of property.
>
> The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of an adequate remedy at law.

In *Ex Parte Royal*, 117 U.S. 241, this Court held that federal courts have jurisdiction to release on habeas corpus before trial on an indictment under a state statute repugnant to the Constitution. Whether the jurisdiction should be exercised in a particular case, the Court said was discretionary, but it qualified this by saying that the discretion must be "subordinated to any special circumstances requiring immediate action."

The second caution laid down by this Court in the *Jeannette* case for the determination of the propriety of exercising jurisdiction was that the state courts are the final

arbiters of the meaning and application of the statute subject to review. This principle really has no application when the statute is being attacked on its face as a direct violation of the First Amendment. This Court and not the state court is the final arbiter of constitutional rights. But in any event, the territorial judge has already held the ex parte order constitutional, and it is plaintiffs' contention the order and indictment under it are void and constitute a previous restraint on freedom of speech. It is certainly futile for plaintiffs to seek affirmation of the respondent judge's erroneous position when to do so means to submit to further deprivation of rights, and the dangers of summary contempt before the respondents who assert the power to punish even if the order is void and in violation of the First Amendment.

In the circumstances of this case, this Court said in the *Jeannette* case, we do not find irreparable injury. But as has already been pointed out, plaintiffs got in another case decided the same day a declaration of the unconstitutionality of the statute complained of.

In *AFL v. Watson,* 327 U.S. 582, trade unions, their officers and members sought to restrain the enforcement of a provision of the Florida Constitution on the ground that it conflicted with the fundamental human liberties guaranteed by the First Amendment and the National Labor Relations Act. This Court held that the allegations contained in the bill of complaint met the tests laid down in the *Jeannette* case, saying:

> This is a strict test. But we think appellants satisfy it. We reach that conclusion on the basis of the allegations concerning the disruption of the collective bargaining processes and the injury to the unions and to the employers alike, if the closed shop agreement is outlawed. . . . The loss in bargaining position by the unions, the disruption of harmonious relationships be-

> tween the union and the employers, the almost certain decrease in union membership—those are matters involving intangible values. Section 267 of the Judicial Code forbids the maintenance of suits in equity in the courts of the United States 'in any case where a plain adequate and complete remedy may be had at law.' But in view of the character of the intangible interests at stake, we cannot see how any remedy at law in the federal courts would be adequate.

Since the Florida Supreme Court had not yet construed the provisions of the Constitution, and since the provision was not void on the face, although it was susceptible of a void interpretation, this Court directed the three-judge district court to retain jurisdiction of the bill until it could determine the questions presented in the light of the state court's interpretation. Here the attack is directed to the face of the order. No interpretation can validate it.

All the cases discussed up to now have assumed that the state officers were acting in good faith and as required by law. It is the petitioners' contention that the respondents are subjecting petitioners to a deprivation of rights under a restraining order unconstitutional by express interpretations of this Court in First Amendment cases, and subjecting petitioners to criminal prosecutions for violation of that void restraining order and for engaging in conduct protected by the First Amendment.

In the *Screws v. United States,* 325 U.S. 91, case, this Court upheld the constitutionality of the conspiracy section of the Civil Rights Act against a charge that the law was so vague that it set up no reasonably ascertainable standard of conduct. This Court in rejecting that contention said:

> The specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by express terms of the Constitution or laws of the United States or by decisions interpreting them.

> Take the case of a local officer who persists in enforcing a type of ordinance which the court has held invalid as violative of the guarantees of free speech or freedom of worship. Or a local official continues to select juries in a manner which flies in the teeth of decisions of this court. If those acts are done wilfully, how can the officer possibly claim that he had no fair warning that his acts were prohibited by the statute? He violates the statute not merely because he has a bad purpose, but because he acts in defiance of announced rules of law. He who defies a decision interpreting the constitution knows precisely what he is doing.

There indeed is the meat and substance of the petitioners' case. In the civil section, of course, a showing of a wilful deprivation is not necessary. But it is petitioners' contention that the action of respondents under color of territorial law flies in the teeth of announced decisions of this Court which are controlling.

IV. The Amended Restraining Order and the Criminal Prosecutions of Petitioners Under It Violate Petitioners' Rights Under the First Amendment Under Decisions of This Court Interpreting Those Rights.

Petitioners contend that the respondents have, under color of law, deprived them of rights of free speech and assembly under the First Amendment as defined by this Court in *Thornhill vs. Alabama,* 310 U.S. 88, *Carlson v. People of California,* 310 U.S. 106, *American Federation of Labor v. Swing,* 312 U.S. 321, *Thomas vs. Collins,* 323 U.S. 516, *Marsh vs. Alabama,* 326 U.S. 501.

The question involved is whether, consistent with these opinions of this Court, a circuit court of the Territory can prohibit peaceful picketing and can circumscribe the rights of free speech and assembly guaranteed by the First Amendment as narrowly as the respondent judge has done in his

amended ex parte temporary restraining order without hearing and without finding in accordance with the principles of due process of great and imminent danger to the state and the public.

What in fact does the order of the respondent judge encompass? He has provided that the members of the International Longshoremen's and Warehousemen's Union shall not "in any manner . . . mass picket or assemble in crowds . . ." on or near the real property of the petitioner—which includes public highways — whether used for business or residence purposes — 12,472 acres comprising 20 company towns — or to interfere with ingress to or egress from said real property.

Mass picketing or congregating in crowds is defined as groups in excess of three at any point of ingress and egress and at other points groups larger than three must be in motion. Even this limited activity must not otherwise violate any of the provisions of the order.

All powers exercised by the Territory either through its legislature or its Courts are exercised by virtue of delegation from Congress. The power of Congress is limited by the Bill of Rights. The First Amendment unequivocally provides:

> Congress shall make no law . . . abridging freedom of speech . . . or the right of people peaceably to assemble.

In the case of the Territory, which derives its power from Congress, these fundamental liberties are not transmitted through the privileges and immunities clause of the 14th Amendment for they are a restriction on the power of Congress itself.

Petitioners are not here contending that the Territory has no power to regulate labor unions and their activity. What petitioners question is the power of a circuit court to

so narrowly define mass picketing without regard to the nature, size and scope of the industrial conflict as to sweep within its ambit both lawful and unlawful conduct in vague, indeterminate language, the construction of which can only be determined in attempted prosecutions.

Petitioners contend that Congress itself could not so narrowly define the rights proscribed by this sweeping previous restraint on the exercise of these fundamental rights.

The principle of *Marsh v. Alabama*, 326 U.S. 501, that the fundamental rights of free speech and assembly occupy a preferred position has been mutilated on the slender ground of a corporation's asserting that its property rights in company towns are denied.

Indeed, the same district court, in two other cases, *Hall vs. Hawaiian Pineapple Company*, and *Hall vs. California Packing Company*, 72 F. Supp. 533, which were brought as a result of two sweeping ex parte injunctions issued by another territorial circuit court judge, held the cases moot because the strike was broken before the return day on the Order to Show Cause, and no contempt proceedings had yet been instituted, said of an order somewhat less restrictive than the one here:

> Maybe the one he (Judge Moore) issued is — and I think it is — too broad in relation to the size and geographical width of the strike. Perhaps, too, I might agree that the order does not keep in mind *Marsh v. Alabama*, 326 U.S. 501, to the effect that Federal rights are exercisable as fully in company towns and villages as elsewhere. Perhaps, too, further investigation upon the return to Judge Moore's order to show cause would show that the many are being penalized for the isolated action of the few and that very definitely there is room for keeping in mind the Supreme Court's admonition that the court itself should so draft the decree that it does not take an attorney to interpret it.

The restraint on free speech and assembly contained in the ex parte temporary restraining order and the indictment must be judged on their face upon the clear principle laid down in *Thornhill v. Alabama,* 310 U.S. 88 (1940). The indictment against the petitioners is a general one framed in the words of the amended temporary restraining order. The respondents do not have to show that the respondent judge could have constitutionally written a different order covering their actions, for

> Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute and not the accusation or the evidence under it, which proscribes the limits of permissible conduct and warns against transgression.

It is clear from the opinions of this Court in *Milk Wagon Drivers v. Meadowmoor Dairies,* 312 U.S. 287, and *American Federation of Labor v. Swing,* 312 U.S. 321, that a restraining order of a court of equity, like a statute, must be judged on its face to determine whether there is a conflict with the First Amendment. At page 308 of the *Meadowmoor* case, Justice Black, in his dissenting opinion, stated:

> There is every reason why we should look at the injunction as we would a statute, and if upon its face it abridges the constitutional guarantees of freedom of expression, it should be stricken down. The injunction, like a statute, stands as an overhanging threat of future punishment.

And Justice Frankfurter, who wrote the opinion of the court in both the *Meadowmoor* and *Swing* cases, said in the *Swing* case:

> It would be improper to dispose of the case otherwise than on the face of the injunction.

In the *Thornhill* case, this Court said:

> In the circumstances of our times, the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.

And in *Thomas vs. Collins,* 323 U.S. 516, 530, this Court said:

> For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds will not suffice. These rights rest on a firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissable limitation.

V. Issuance of Amended Order and Prosecution of Petitioners is Not Justifiable by Clear and Present Danger or Any Decision of This Court Defining Impermissible Limits of Exercise of Rights.

It is true that the rights of free speech and assembly are not unqualified rights, and where the clear and present danger tests are met, the exercise of those rights may be regulated in the public good.

Thus, in the *Thornhill* case, this Court made it clear that

> We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to those interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.

But we are not here concerned with a legislative enactment, narrowly drawn to cover a precise situation. Surely, the words "picketing en masse" cannot be so woodenly and arbitrarily applied that Congress, or the territorial legislation, or least of all, the respondent judge, can by invoking the words "picketing en masse," justify any restraint on free speech and assembly they might see fit to impose.

And again, in the *Meadowmoor* case, the court held that the sovereign state of Illinois could choose to exercise its police powers through its constitutional courts and under the facts there found could restrain even peaceful picketing. That case, however, did not involve an ex parte hearing issued without notice. The lower court in Illinois, after lengthy hearings by a master, denied an injunction against any conduct except acts of violence. The time schedule in that case was as follows: The acts of violence alleged extended over a period of three years; picketing began eight months after the alleged acts of violence; it was four years afterwards before the trial judge granted an injunction, limited to violence alone; five years before the Supreme Court of Illinois directed a more stringent injunction against peaceful persuasion, and seven years before the United States Supreme Court sustained the injunction. The injunction was based on a finding of the master that because of the past acts of violence, even peaceful picketing would evoke fear in strangers to the dispute. It is obvious from the majority opinion that but for the long and extended hearings, the findings of fact, that the same result would not have been reached. Thus the court says:

> Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality.

The majority of this Court said that Illinois could choose to exercise its police power through its courts consistent

with the Fourteenth Amendment. Congress itself has empowered territorial courts to exercise only the judicial power and has delegated to the legislative the power to legislate on all rightful subjects not inconsistent with the federal constitution and laws. It must be remembered, also, that the Fourteenth Amendment does not transmit to residents of states all the rights guaranteed by the Bill of Rights. But the Territory of Hawaii is limited directly by the First Amendment. In the police power under the Fifth and Fourteenth Amendments, the test is the reasonableness of its exercise and not the clear and present danger test under the First.

But even assuming that a territorial court can exercise police power, the conduct of the respondent judge is not justified if the warning of the majority of the court in the *Meadowmoor* case—that it is of prime importance that no constitutional rights be defeated by insubstantial findings of fact screening reality—is heeded.

Legal scholars, Congress and the courts have always considered affidavit proof and partisan testimony, where the right of cross-examination is lacking, insubstantial and unreliable in labor injunction cases. Thus Justice Frankfurter, who wrote the court's opinion in the *Meadowmoor* case, in his book, *The Labor Injunction,* says:

> In labor cases, however, complicating facts enter. The injunction cannot preserve the so-called status quo; the situation does not remain in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences. Morover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted. Choice is not between irreparable damage to one side and compensable damage to the other. The law's con-

> undrum is which side should bear the risk of unavoidable irreparable damage. Improvident denial of the injunction may be irreparable to the complainant; improvident issue of the injunction may be irreparable to the defendant. For this situation the ordinary mechanics of the provisional injunction proceedings are plainly inadequate. Judicial error is too costly to either side of a labor dispute to permit perfunctory determination of the crucial issues; even in the first instance, it must be searching. The necessity of finding the facts quickly from sources vague, embittered and partisan, colored at the start by the passionate intensities of a labor controversy, calls at best for rare judicial qualities. It becomes an impossible assignment when judges rely solely upon the complaint and the affidavits of interested or professional witnesses, untested by the safeguards of common law trials—personal appearances of witnesses, confrontation and cross-examination.

And again Justice Frankfurter, after pointing out the fact that most judges, in the heyday of the hated labor injunction, followed the general rule that picketing per se is an admission of violence, said further:

> To expect such a mode of hearing to elicit the truth about these ambiguous acts and motives of men is to look for miracles. To ask such a system of procedure to work without serious friction and without arousing wide skepticism regarding law's fair-dealing is to subject the legal order to undue stress and strain. The chancellors of the fourteenth and fifteenth centuries pursued more rational methods of eliciting truth. . . . This ancient wisdom has been forgotten in the most sensitive contact between law and feeling. To quote Judge Amidon again ". . . affidavits are an untrustworthy guide for judicial action . . . it is peculiarly true of litigation growing out of a strike, where feelings on both sides are necessarily wrought up, and the desire for victory is likely to obscure nice moral questions and poison the minds of men by prejudice. . . .

> Experience . . . has caused me to be so incredulous of affidavits that I have required in all important matters the presence of the chief witnesses upon each side at the hearing. These witnesses have been subjected to oral examination. The court has had a chance to observe their demeanor. A comparison of the picture produced by their testimony with that produced by their affidavits has proven the utter untrustworthiness of affidavits. Such documents are packed with falsehoods, or with half-truths, which in such a matter are more deceptive than deliberate falsehoods."

Petitioners submit there can be nothing but insubstantial findings of fact screening reality in ex parte hearings, and that when a judge assumes to go beyond restraining acts of violence alleged by an employer to have occurred and restrains even peaceful activity, he has exceeded his power and made a mockery of the Bill of Rights.

But this Court, in the *Meadowmoor* case, did not stop with the warning against insubstantial proofs. It pointed out that the master found, and the Illinois Supreme Court rested its decision on a finding that because of the past violence of bombings and window smashing, third persons would be intimidated because . . .

> The momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the Supreme Court of Illinois found. We cannot say that such a finding so contradicts our own experience to warrant our rejection.

The Court here referred to violence which included window smashing, bombing and burning of stores and physical violence extending over a period of four years.

Surely, acts alleged by an employer to have been committed a day or so before an ex parte hearing cannot justify a restraint against peaceful picketing and assembly on the part of all sugar workers on the Island of Kauai and all

other workers belonging to the same union, the International Union and all activity on, at or near the thousands of acres of the employers' property or the 20 company towns in which the employees live.

It is apparent that the ex parte amended restraining order is an order designed to break a strike. We are not concerned here with narrow city streets and crowded industrial areas, but with an agricultural strike involving large areas and large numbers of employees. Let us assume, for example, that an employer having procured an order limiting picketing to three persons, set into operation what the La-Follette Civil Liberties Committee described as a Mohawk Valley Plan whereby every means of communication and public pressure is used against employees to defeat their morale, and to assure them that the strike is broken. Under such circumstances, picketing is the only means which the employee has to communicate his faith in collective action.

It is obvious that if a circuit court of the Territory has the power on mere ex parte representation by an employer to so narrowly limit the right to picket, then an invincible sword has been forged to strike to the heart every labor organization in the Territory.

Even under the Fourteenth Amendment, where states, it is said, may exercise their police power through the judicial arm, the test of reasonableness must apply.

Even assuming for the argument, under this count of appellants' complaint, that a circuit court may limit the numbers of pickets, surely that limitation must be reasonable in the light of the facts and circumstances, and surely the order must be couched in language so that men of common understanding can understand and interpret its meaning.

Appellants respectfully submit that the amended temporary restraining order and the information under it, which charges no act of fraud or violence, violates appellants'

rights of free speech, and is void because it is vague and ambiguous and includes within its scope lawful as well as unlawful conduct.

If a territorial circuit court judge, on ex parte application, can issue such an order as the one here issued, and if petitioners can be prosecuted under it, petitioners and their fellow workers in Hawaii are back at the point which Senator Norris eloquently described:

> There can be no question, therefore, that there has been created, as a result of writing law into injunction orders and then enforcing those orders by the same judge who wrote them without a grant of trial by jury, that condition of uniting the two powers of making and enforcing laws in one person or one body of men wherein, using the language of Blackstone, "there can be no public liberty."
> It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute. Neither is it difficult to see how such injunctions, violating the conscience of civilization, should frighten persons against whom such injunctions are issued into desperation. What free American citizen is willing to submit to the violation of his sacred rights of human liberty and freedom?

Respectfully submitted,

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In The
Supreme Court of the United States

October Term, 1948

No. ~~718~~ 52

CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL, DANIEL RODRIGUES FERREIRA, YUTAKA GOHARA, CORNEL IHA, MASASHI KAGEYAMA, TOROICHI KANDA, FRANK GONSALVES PERREIRA, NOBORU TAKEUCHI, FRED TANIGUCHI and GENKICHI WADA,

Petitioners,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii and WALTER D. ACKERMAN, JR., as Attorney General of the Territory of Hawaii,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In The
Supreme Court of the United States

October Term, 1948

No. 718

CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL, DANIEL RODRIGUES FERREIRA, YUTAKA GOHARA, CORNELIHA, MASASHI KAGEYAMA, TOROICHI KANDA, FRANK GONSALVES PEREIRA, NOBORU TAKEUCHI, FRED TANIGUCHI, and GENKICHI WADA,

Petitioners,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii and WALTER D. ACKERMAN, JR., as Attorney General of the Territory of Hawaii,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decree of the United States Court of Appeals for the Ninth Circuit was entered January 14, 1949. (R. 392) The petition for writ of certiorari and brief in support thereof were filed April 11, 1949.

STATEMENT OF THE CASE

The statement of the case given on pages 2 to 8 of the petition is supplemented and controverted in the following respects.

This case was brought in the United States District Court for Hawaii[1] under 28 U.S.C. § 1343(3),[2] which confers jurisdiction on district courts of the United States of actions to redress the deprivation, under color of any law, custom or usage of any state, of any right secured by the Constitution, or by any law of the United States providing for equal rights of citizens, or of all persons within the jurisdiction, of the United States. (R. 5) The action was brought to restrain further proceedings in a criminal contempt case pending in the Circuit Court of the Fifth Circuit, Territory of Hawaii: (R. 21) Respondents are the presiding judge and prosecutor, respectively, in said contempt proceeding. (R. 11) Said contempt proceeding was brought to punish violations of a temporary restraining order issued by respondent circuit judge to regulate picketing during a strike in the sugar industry in the Territory in 1946. (R. 7-9) It was alleged in the complaint that plaintiffs (petitioners herein) were deprived by the issuance of such order of their right of peaceful picketing under the Norris-LaGuardia Act[3] and section 20 of the Clayton Act[4]

[1]The District Court for Hawaii has the jurisdiction of district courts of the United States. 48 U.S.C. § 642. In the revision of Title 28 of the U. S. Code, the District Court for Hawaii is to all intents and purposes a district court of the United States. 28 U.S.C. §§ 91, 132-135.

[2]Formerly 28 U.S.C. § 41(14).

[3]29 U.S.C. §§ 101-115; 47 Stat. 70-73.

[4]29 U.S.C. § 52; 38 Stat. 738.

and under the Constitution of the United States, and were threatened with further deprivation of such right by the prosecution of said contempt charge. (R. 6-20) The strike was over for more than ten weeks when this action was filed. A temporary restraining order was issued against respondent attorney general and a preliminary injunction was subsequently granted. (R. 49-51, 66-69)

Respondents filed an answer[5] to the complaint, incorporating as part thereof certified copies of the records and files in the original equity suit in the territorial court[6] and a transcript of the *ex parte* hearing upon which the restraining order complained of by petitioners was issued. Respondents subsequently filed a motion for hearing and determination of defenses before trial under Rule 12(d) of the Federal Rules of Civil Procedure and for dismissal of the suit. (R. 306-309) Petitioners filed a motion to strike those portions of respondents' answer which related to the original equity proceedings and the records thereof. (R. 309-310) Respondents filed another motion, under Rules 12 and 56, requesting that in ruling upon respondents' motion to dismiss, the District Court take into consideration the entire record made by the pleadings, including the exhibits attached to the complaint and answer. (R. 312) After a hearing on respondents' motions, which were considered as a motion for summary judgment, the District Court grant-

[5]Although separate answers were filed, one merely adopted the other. (R. 69-304, 305)

[6]The restraining order issued in a suit in equity brought by the Lihue Plantation Company, Ltd., against the International Longshoremen's & Warehousemen's Union (hereinafter abbreviated ILWU), its local units and the officers thereof, in the Circuit Court of the Fifth Circuit, Territory of Hawaii. (R. 23-31)

ed respondents' motions and entered judgment dismissing the action. (R. 314-340, 343-344) Upon appeal, the Court of Appeals for the Ninth Circuit affirmed judgment. (R. 392) The opinions of the District Court and the Court of Appeals are reported in 74 F. Supp. 865 and 172 F. 2d 176, respectively.

Respondents agree, as stated on page 2 of the petition, that the restraining order complained of in the instant case was issued *ex parte* and in a labor dispute. It is to be noted, however, that at the *ex parte* hearing, twenty-three affidavits were received in evidence (R. 96-158, 163-164, 246-249) and the testimony of nine witnesses heard by the territorial court (R. 165-172, 251-299), on the basis of which the court found that the strikers had exceeded the bounds of peaceful picketing in that they had prevented the employer's manager and supervisory employees from entering its sugar factory, had prevented free access to its general merchandise store and in effect had taken possession and control of both factory and store, and also had been guilty of mass picketing and intimidation, and that the employer was threatened with irreparable damage by reason of the interruption of its vital operations. (R. 173-174, 301-303) Moreover, at the hearing the question of the court's jurisdiction in the matter was raised by the court on its own motion, particularly with reference to the provisions of the Norris-LaGuardia and National Labor Relations Acts, and the question then argued by counsel for the employer. (R. 161-163) The jurisdictional question was subsequently raised again by the respondents in the equity suit by an oral motion to vacate and dissolve the restraining order and thereupon extensively argued by counsel for the parties and *amicus curiae*.

(R. 189-193, 235-238) One other fact that should be mentioned in connection with the proceedings in the original suit in equity was the response by the respondents therein on a day set by the court to consider a possible modification of its order. Instead of the appearance of their counsel as was expected by the court, the following message was received:

"RADIOGRAM

"Ihufwad 140 Drush Honolulu 23
Honorable Judge Philip L. Rice
Judge of the Fifth Circuit Court
Court House Lihue

"Confirmation copy telephoned Sept. 23, 1946, to Nakamura by F. W. Time 146 P Date 9/23/46

"Re hearing today on possible modification restraining order Lihue Plantation Company case we have instructed our attorneys Richard Gladstein and Richard Mirikitani not to appear, although the court has set hearing for today we have not actually been ordered to appear inasmuch as we regard the court's ex parte restraining order as improperly issue in excess of jurisdiction and denying union members due process of law we see no purpose in being represented at a hearing to modify an order which in the first place we consider to be void and issued in clear defiance of our constitutional right to be heard in advance of being judged once again we ask you to vacate the restraining order.

INTERNATIONAL LONGSHOREMEN'S
AND WAREHOUSEMEN'S UNION,
JACK HALL,
Regional Director."
(R. 194)

The statements on page 4 and elsewhere in the petition and throughout petitioners' brief as to the

nature of the charges brought against petitioners for violating the restraining order are grossly misleading. The substance of the charges, which are substantially in the language of the applicable portions of the restraining order, is as follows: As the first count, that petitioners wilfully violated the restraining order by mass picketing, by assembling with many others in compact groups and congregating in crowds, on and near the employer's property, *to thereby prevent and attempt to prevent and physically obstruct and interfere with ingress to and egress from the employer's premises by its employees*, and, as the second count, that petitioners wilfully violated the restraining order by picketing with many others in groups of more than three pickets *at points of ingress to and egress from the employer's premises.* (R. 35, 39, 360, 363) The italicized portions are omitted in petitioner's version of the charges. Respondents have been repeatedly compelled in the proceedings before the District Court and the Court of Appeals and again before this Court to challenge petitioners on this matter.

Another matter requiring clarification is that of the relationship of the instant case to the case of *ILWU* v. *Wirtz*,[7] referred to in note 2 on page 2, note 5 on page 5 and note 8 on page 9 of the petition. The *Wirtz* case was a suit brought by the ILWU in the Supreme Court of the Territory of Hawaii for a writ of prohibition[8] against the judge of the Circuit Court

[7] 37 Haw. 404, affirmed 170 F. 2d 183 (C.A. 9th, 1948), certiorari denied February 28, 1949, rehearing denied May 2, 1949.

[8] The writ is defined by the Revised Laws of Hawaii 1945 as follows: "*Sec. 10270. Definition.* This is a mandate which issues in the name of the Territory from the supreme court, or from any justice thereof, or a circuit judge, directed to the judge and the party

of the Second Circuit to restrain him from proceeding with a suit for injunction brought by another employer against the union during the same strike. The writ was denied. The sole question involved was whether the territorial court was a "court of the United States" within the meaning of the Norris-LaGuardia Act and as such subject to the jurisdictional limitations of said Act. Therefore, only the first of the issues set out in the four counts in the instant case was properly presented in the *Wirtz* case. It is true, however, that the petitioners in that case, notwithstanding the narrow question there in issue, argued the same issues as in this case.

Also requiring correction are the statements on pages 5 and 6 of the petition respecting the exceptional circumstances and irreparable injury allegedly "shown" to the District Court by petitioners. The circumstances referred to were actually mere assertions as to matters of fact or contentions as to matters of law made by petitioners' counsel during the course of argument. They were not "shown" in the sense that they were supported by any evidence, for there was no trial. Nor were they even supported by any allegation in petitioners' pleadings, for, as shown by the complaint in this case, the conduct on the part of respondents complained of, and purportedly "fully described" in the complaint (R. 6), consisted simply of the issuance of the restraining order and the prosecution of the criminal contempt charges for viola-

suing in any inferior court, forbidding them to proceed any further in the cause, on the ground that the cognizance of such cause does not belong to such court, or that the cause or some collateral matter arising therein is beyond its jurisdiction, or that it is not competent to decide it."

tions of the order of the territorial court. (R. 5-22)

The statement on page 8 of the petition that the appearance of *amicus curiae* in the District Court was "at the request of the respondents" is inaccurate. The request was made by *amicus*. As stated in the opinion of the District Court, "the application was . . . favored by the defendents". (R. 315)

Also, the statement on the same page (page 8) to the effect that the District Court ruled against petitioners and dismissed the complaint "without permitting petitioners to be heard on the merits" is misleading. There was no trial, it is true, for the case was disposed of on the defenses of law raised in respondents' answer. But there was a very extensive hearing on the issues of law, in which petitioners' counsel was allowed unlimited time for and latitude in argument.

Another statement on page 8 of the petition, that the Court of Appeals "held that the District Court erred in granting summary judgment without hearing on the merits", is obviously incorrect, as is shown by the sentence immediately following the statement in question as well as by the opinion of that Court. (R. 385; 172 F. 2d 176, 177)

Note 7 at the bottom of page 8 of the petition also requires correction. The only erroneous assumption respecting petitioners' contention that the criminal prosecutions are not in good faith is the assumption by petitioners that their contention is alleged in their complaint and that the District Court and respondents deemed the issue to have been raised by the complaint. Respondents have consistently maintained that the

pleadings do not raise such an issue and both the trial and appellate courts have so ruled. (R. 339, 387; 74 F. Supp. 865, 876, 172 F. 2d 176, 177)

QUESTION PRESENTED

The question presented in this case is whether petitioners, members of a labor union, are entitled to an injunction from the federal court to restrain the prosecution of a criminal contempt proceeding pending against them in a territorial court, in which petitioners are charged with wilfully violating a restraining order, issued by the territorial court in the course of a strike, which prohibited mass picketing to physically obstruct ingress and egress and limited the number of pickets at points of ingress and egress.

Petitioners' statement of the question presented, stated on page 10 of their brief, is subject to the following criticisms. The question of whether petitioners have been deprived of constitutional rights might be controlling in an action for damages but in a suit for injunctive relief, such as this case, the question should relate to the future. The characterization of the restraining order as one "prohibiting peaceful picketing and assembly" and of the pending prosecution as one "for engaging in peaceful picketing and assembly" is misleading and unfair, as previously pointed out on page 6 of this brief. There is no point to the question of whether they are entitled to a hearing on the merits of their complaint. As shown on page 8 of this brief, petitioners had a hearing on the merits of their complaint to which, the Court of Appeals held, they were not entitled. (R. 385; 172 F. 2d 176, 177)

ARGUMENT

1. The reasons relied on by petitioners do not justify granting certiorari.

On pages 10 to 14 of the petition, petitioners set out, in one unnumbered paragraph and in paragraphs numbered I to VI, the reasons relied upon by them for the granting of the writ. Respondents propose to show, by a brief discussion of each paragraph in order, that none of these paragraphs present a substantial reason for granting certiorari.

The unnumbered, or introductory paragraph, contains nothing but misleading statements. The statement that the issues in this case are of particular importance to workers in the Territory and to all residents of the territories and possessions, suggests that the territorial status is significant in this case. It is to be noted, however, that in the consideration of any constitutional issue of free speech or peaceful assembly, the territorial status of Hawaii is entirely immaterial, for the First Amendment liberties obtain in Hawaii in the same way that they do in the several states. *Hawaii* v. *Mankichi*, 190 U. S. 197. The statement that petitioners are "threatened" with criminal prosecution suggests that this case involves a threatened, instead of a pending, prosecution. The rest of the paragraph is a misstatement of the nature of the order and criminal prosecution against which petitioners seek to be relieved, previously commented upon on page 6 of this brief.

Paragraph I states that "the Court of Appeals has in effect sanctioned" an order issued by respondent judge restricting picketing, "in defiance of applicable

decision of this Court". Of course, neither the Court of Appeals nor the respondent judge has acted in defiance of this Court or any decision of this Court. As a matter of fact, the Court of Appeals held it was improper to consider the constitutional issue which petitioners sought to have reviewed. (R. 385; 172 F. 2d 176, 177) The fact that the courts have differed with petitioners as to which of the decisions of this Court are applicable in this case is not a sufficient basis for petitioners' statement. The statement to the effect that the order in question provides that only three persons could exercise the rights of free speech and assembly in concert is grossly misleading.

The statement in paragraph II of petitioners' belief that respondent judge has "acted in defiance of, and in flagrant violation of decisions of this Court" merits no further comment.

In paragraphs III and IV, petitioners contend that the order issued by respondent judge is in violation of the rights of free speech and peaceful assembly guaranteed by the First Amendment. Petitioners cite *Thornhill* v. *Alabama*, 310 U. S. 88, and *Marsh* v. *Alabama*, 326 U. S. 501, which are apparently among the applicable decisions referred to in the preceding paragraphs.

The statements in the second and third sentences of paragraph III, to the effect that the order defines " 'mass picketing' as 'three' " and also "prohibits the overt act of peaceably assembling", are incorrect. Petitioners apparently derive such a definition by selecting certain words from one provision of the order and combining them with certain other words

selected from another provision.[1] The order does not prohibit any assembly as such; the prohibition is against assembling for the purpose of obstructing ingress and egress.[2] Furthermore, the statement in the third sentence of paragraph IV that "the means of free communication of petitioners and of hundreds of people living in company towns . . . . have been denied, and fundamental rights of individuals to free speech and assembly have been hacked to size to meet the demands of a corporation" is not justified by either the order or the facts.

Paragraph V contains petitioners' contention that the order issued by respondent judge must be judged on its face and that so judged, it is void, first, for contravening the First Amendment and, secondly, for being "so vague and ambiguous as to constitute a denial of due process". For the proposition that the order must be judged on its face, petitioners cite *A. F. of L.* v. *Swing*, 312 U. S. 321, and *Drivers Union v. Meadowmoor Co.*, 312 U. S. 287.[3] The cases cited stand for two different rules respecting injunctions restrictive of picketing. In the earlier, the *Drivers Union* case, it was held that an injunction issued in a background of violence and other unlawful conduct

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[1]Paragraph 7 of the order prohibits "mass picketing by assembling in compact groups or congregating in crowds on or near real property of the Petitioner . . . to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property . . ." (R. 45); a provision in the succeeding paragraph limits "the number of pickets . . to not more than three (3) pickets in a group at any point or station when stationed at points of ingress to and egress from the Petitioner's property . . ." (R. 46)

[2]The District Court so ruled. (R. 339; 74 F. Supp. 865, 875.)

[3]Petitioners' discussion of these cases in their brief at page 28 reveals that they are relying on a dissenting opinion in the *Drivers Union* case.

"must be read in the context of its circumstances". 312 U. S. 287, 298. In the *Swing* case, where the *Drivers Union* case is distinguished, it was held that an injunction which is issued, not because of violence or other unlawful conduct, but merely because there was no dispute between employer and employees, must be judged on its face. 312 U. S. 321, 325. Respondents submit that in view of the findings made by the territorial court upon which the order in question in the instant case was issued (R. 173-174, 301-303), which are summarized on page 4 of this brief,[4] the rule of the *Drivers Union* case is applicable in this case. However, this is not to be taken as an admission that the order is void if judged on its face. On the contrary, respondents will show in part 3 of this argument that it is valid under either test. The second sentence of this paragraph is subject to the same criticism already stated on page 6 of this brief.

Paragraph VI consists of petitioners' contentions that their complaint sets forth a cause of action within the principle of *Hague* v. *CIO*, 307 U. S. 496, and *Douglas* v. *Jeannette*, 319 U. S. 157, and that they are entitled to a hearing on the merits. To the contrary, the Court of Appeals has held that under the

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[4]The District Court summarized the circumstances as follows:
". . . The situation made to appear to Judge Rice by affidavit and evidence was one of increasing tenseness lending reasonable credence to the belief that if things were allowed to continue, with ineffective police control, bloodshed might easily ensue. The described scene was one of mill and store entrances solidly blocked by hundreds of massed pickets preventing anyone from going in or out even for maintenance purposes, of plantation roads blocked, or homes picketed and families threatened, annoyed, and disturbed, and of a rising tempo of non-peace inducing language wherever pickets were assembled . . ." (R. 338)

principle of the *Jeannette* case, the District Court erred in considering the merits of petitioners' complaint and that the complaint should have been dismissed for want of equity. (R. 385; 172 F. 2d 176, 177) Petitioners also contend in this paragraph that questions of constitutionality should not be decided on the basis of a demurrer to the complaint or like pleadings, but should be determined upon the evidence if it is likely to throw light on the question. Such contention has no application to the decision sought to be reviewed by this petition, for the Court of Appeals not only declined to consider the merits of petitioners' contentions as to the constitutionality of the order attacked by the complaint, but ruled that it was error for the District Court to have considered such questions. Furthermore, the contention seems inconsistent with the contention made in paragraph V that the order in question is void on its face.

It appears from the foregoing review of the petition that the only reason advanced for the granting of certiorari is petitioners' contention that the decision of the Court of Appeals is at variance with their interpretation of the decisions of this Court. It is respectfully submitted that it is the petitioners, and not the Court of Appeals, who are in error. Notwithstanding their many statements, there are but two contentions which require further consideration: (1) that their complaint states a cause of action for injunctive relief, and (2) that the order of the territorial court of which they complain contravenes the First Amendment. Respondents believe that the latter question is not in issue in this case, but assuming *arguendo* that it is, propose to discuss both questions

in the following portions of this brief. It is respectfully submitted that the argument will clearly show that petitioners' contentions are not supported by the applicable decisions of this Court and that, therefore, there is no substantial basis for granting certiorari in this case.

2. The Court of Appeals correctly held that the District Court should not have entertained the injunction proceeding. The usual rule against collateral interference by a federal court in a pending non-federal criminal prosecution applies.

While the District Court dismissed the case, holding that the territorial circuit judge had the power to issue the temporary restraining order, upon which the pending criminal contempt charges are based, and that its terms were valid (R. 314-340; 74 F. Supp. 865), the Court of Appeals held that under the doctrine of *Douglas* v. *Jeannette*, 319 U. S. 157, petitioners' case was not cognizable in equity. (R. 384-391; 172 F. 2d 176) The Court of Appeals further held that by reason of the principles of the *Jeannette* case, the applicability in the Territory of Hawaii of section 265 of the Judicial Code, 28 U.S.C. § 379, now section 2283 of the new Title 28, need not be considered.

a. The rule stated

We have pointed out that the instant case solely concerns criminal charges pending in the territorial court. This suit was brought in the federal court in an attempt to use injunctive relief as a means of quashing the pending criminal charges. This Court has held that even apart from section 265 of the Judicial Code, 28 U.S.C. § 379, now section 2283 of the new

Title 28, a federal district court is not authorized to use injunction proceedings as a means of quashing criminal charges pending in a state court. *Harkrader* v. *Wadley*, 172 U. S. 148, 165; *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 217; *Ex parte Young*, 209 U. S. 123, 162 (distinguishing threatened prosecutions from pending proceedings); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (affirming grant of injunctive relief as to future prosecutions but reversing with respect to a pending criminal case and holding that such pending prosecution could not be enjoined); *In re Sawyer*, 124 U. S. 200, 210 (denying equitable jurisdiction to restrain removal of public officers, by analogy to rule against stay of criminal proceedings). The cases are reviewed and the distinction between pending and merely threatened prosecutions emphasized in *Babcock* v. *Noh*, 99 F. 2d 738, 739 (C.A. 9th, 1938); *Priceman* v. *Dewey*, 81 F. Supp. 557, 559 (D.C.E.D.N.Y., 1949); *Society of Good Neighbors* v.*Groat*, 77 F. Supp. 695 (D.C.E.D. Mich., 1948); 42 Yale L. J. 1169, 1191. The district judge therefore erred in holding that he had discretion to interfere in the pending criminal proceedings. (R. 324; 74 F. Supp. 865, 870)

To the usual rule of non-interference in pending state criminal cases is added the positive statutory prohibition against the issuance of injunctions to stay any pending state court proceedings. *Essanay Film Co.* v. *Kane*, 258 U. S. 358, 361; *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118. The exceptions to the statutory rule are well defined and the instant case does not fall within any of them. The conclusion is the same whether the case is considered in the

light of the provisions of section 2283 of the new Title 28, or the recognized statutory and judicial exceptions under section 265 of the former Judicial Code, 28 U.S.C. § 379.[1]

b. The rule applied to civil rights cases

The first exception made in section 2283 is contained in the words "except as expressly authorized by Act of Congress". The courts already had recognized that Congress might expressly authorize exceptions to the rule against stay of pending proceedings. The statutes creating such exceptions have been enumerated.[2] With respect to the jurisdiction conferred by the Civil Rights Act, Congress made no such exception. It expressly provided that such jurisdiction "shall be exercised and enforced in conformity with the laws of the United States" and, in some instances, "the common law, as modified and changed by the constitution and statutes of the State wherein the court . . . is held". R. S. 722, 8 U.S.C.A. § 49a (contained in March 1949 supplement to U.S.C.A.), formerly 28 U.S.C. § 729. As stated by Mr. Justice Holmes:

> " . . . the language of § 1979 [8 U.S.C. § 43] does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief. The words are 'shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.' They allow a suit in equity only when that is the proper proceeding for redress, and they refer

[1] This case antedates the new Title 28, the case having been decided by the District Court on December 22, 1947. (R. 344)

[2] *Toucey* v. *New York Life Ins. Co., supra*, 314 U.S. 118; *Bowles* v. *Willingham*, 321 U. S. 503.

to existing standards to determine what is a proper proceeding . . . "

Giles v. *Harris*, 189 U. S. 475, 486

Were the sphere of equitable jurisdiction of the United States district courts extended by R. S. 1979 (8 U.S.C. § 43), such extension would include every alleged deprivation of constitutional rights. The resultant exception to the usual standards would be so broad as to nullify not only section 2283 of the new Title 28 (section 265 of the former Judical Code) but also every other rule governing the withholding of injunctive relief. This Court has always applied the usual limitations on the exercise of equity jurisdiction in cases brought under the Civil Rights Act the same as in other cases. *Douglas* v. *Jeannette*, *supra*, 319 U. S. 157; *Bevins* v. *Prindable*, 314 U. S. 573. The Court of Appeals held in the instant case that if section 2283, formerly 28 U.S.C. § 379, applies in the Territory (a question the Court did not decide), the instant case presents no congressional exception. (R. 391; 172 F. 2d 176, 179) The following cases in other circuits are to the same effect, in each of them the statute, then section 265 of the Judicial Code, 28 U.S.C. § 379, having been applied by a district court in a civil rights case: *United Electrical, R. & M. Workers* v. *Westinghouse Electric Corp.*, 65 F. Supp. 420 (D.C.E.D. Pa., 1946); *Carras* v. *Monaghan*, 65 F. Supp. 658 (D.C.W.D. Pa., 1946); *Mickey* v. *Kansas City*, 43 F. Supp. 739 (D.C.W.D. Mo., 1942); see also *Atlantic Fishermen's Union* v. *Barnes*, 71 F. Supp. 927, 928 (D.C. Mass., 1947); *Davega-City Radio, Inc.* v. *Boland*, 23 F. Supp. 969 (D.C.S.D. N.Y., 1938). That the Civil Rights Act is not an

exception to the statutory rule against stay of pending proceedings was expressly held in *Hemsley* v. *Meyers*, 45 Fed. 283, 289-290 (C. C. Kans., 1891); *Aultman & Taylor Co.* v. *Brumfield*, 102 Fed. 7, 12 (C.C.N.D. Ohio, 1900); *Live-Stock Dealers' & Butchers' Assn.* v. *Crescent City Live-Stock Landing & Slaughter-House Co.*, 1 Abb. U. S. 388, 15 Fed. Cas. p. 649, Case No. 8408 (C. C. La., 1870).

The second and third exceptions mentioned in section 2283 likewise do not apply.[3]

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[3]The second exception mentioned in section 2283 concerns a stay granted by a court of the United States "where necessary in aid of its jurisdiction". This likewise codifies an existing exception, relating to cases where possession of a res is necessary to jurisdiction and the federal court was the first to acquire possession of the res. *Toucey* v. *New York Life Insurance Co., supra*, 314 U. S. 118, 135. The exception has not been applied to actions in personam. *Mandeville* v. *Canterbury*, 318 U.S. 47, 49; *First National Bank & Trust Co.* v. *Village of Skokie*, 173 F. 2d 1 (C. A. 7th, 1949). The exception might be applied where the jurisdiction of the federal court attached first and where the express purpose of the federal action was to enjoin the bringing of the state court action, filed notwithstanding. *Looney* v. *Eastern Texas R. R.*, 247 U. S. 214; *Truax* v. *Raich*, 239 U.S. 33, 36, affirming 219 Fed. 273, 284. This is not the instant case, for the criminal charges were filed first and then the federal court action was brought to quash the pending charges. Another instance of the application of the exception in aid of jurisdiction is mentioned in the Revisers' notes on section 2283 where reference is made to the stay of proceedings in state cases removed to the district courts, but this was already deemed an exception made by congressional act. *Toucey* v. *New York Life Insurance Co., supra*, 314 U.S. 118, 133. The instant case is not a removal case.

The third exception mention in section 2283 concerns a stay granted by a court of the United States "to protect or effectuate its judgments". This relates to the power to enjoin relitigation in state courts of cases and controversies already fully adjudicated by federal courts. The Revisers' notes state that the exception was inserted to grant a power disclaimed by this Court in the *Toucey* case. It represents the only instance in which section 2283 departs from the *Toucey* case. The exception has no bearing on this case.

c. The rule applicable in Hawaii

The rule that injunctive relief is not a means of quashing pending criminal charges applies whether such criminal charges are pending in a court of the Territory of Hawaii or in a state court. In Hawaii, as in a state, the maintenance of law and order centers in the territorial courts, only the enforcement of federal statutes in the federal court. Hence, all of the reasons for the rule of non-interference by injunctive process in pending criminal cases, and for requiring exhaustion of the remedies available in the system of courts where the criminal prosecution lies and upon appeal therefrom, apply equally in Hawaii. In the instant case the district court assumed jurisdiction over a territorial criminal prosecution which could not be removed to it, and in effect extended the scope of the applicable removal statute by injunctive process (see *Aultman & Taylor Co.* v. *Brumfield*, *supra*, 102 Fed. 7, 12) so as to bring before itself the question whether the criminal charges should be quashed. The Court of Appeals rightly held that the District Court should not have entertained the case.

The relation between the United States District Court for Hawaii and the courts of the Territory of Hawaii is and always has been recognized to be the same as that between the courts of the United States and the courts of a state.

This principle as to the relation between the District Court for Hawaii and the territorial courts was recognized by this Court in *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 383, when it held that the doctrine of abstention which withholds rulings by federal courts upon the constitutionality of state statutes

until the interpretation and application thereof have been decided by the state courts, applies equally to stay the hand of the District Court for Hawaii until the territorial courts have construed territorial statutes.

Section 86 of the Hawaiian Organic Act (48 U.S.C. §§ 641-642, 643-645) at all times since its original enactment (31 Stat. 141, c. 339) has provided, and still with slightly different wording,[4] provides, that:

> " . . . The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."
>
> 48 U.S.C. § 645.

Said section 86, prior to the enactment of Title 28 of the United States Code and when this case was decided by the District Court, also provided that the laws relating to jurisdiction of district courts of the United States and the manner in which they proceed should govern the court created by said section 86 (48 U.S.C. § 642). This part of section 86 was deleted upon the enactment of Title 28 of the United States Code because said court was included in that title as

[4]Public Law 773, 80th Cong., 2d Sess., which enacted the new Title 28 of the United States Code as section 1 of that Act, provides in section 8 that section 86 of the Hawaiian Organic Act is amended to read as follows:

> "Sec. 86. The laws of the United States relating to removal of causes, appeals and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of United States and the courts of the Territory of Hawaii."

a district court of the United States, as noted on page 2 of this brief.

That Congress intended to establish in the Territory of Hawaii, between the federal court created by the Hawaiian Organic Act and the system of territorial courts then existing and substantially by that act perpetuated, the relation which exists between the courts of the United States and the state courts in the various states, was held soon after the enactment of the Hawaiian Organic Act. *Wilder's S. S. Co.* v. *Hind*, 108 Fed. 113, 114-115 (C.A. 9th, 1901), aff'd 183 U. S. 545. Such has been the relation of the courts since their inception. The Court of Appeals so held in this case (R. 390; 172 F. 2d 176, 179), as did the District Court in this case (R. 60, 64; 69 F. Supp. 897, 899, 901), and in *Hall* v. *Hawaiian Pineapple Co.*, 72 F. Supp. 533, 535. The principle was firmly established in a series of cases holding that the federal rule against interference by habeas corpus with the proceedings of state courts is equally applicable in the Territory of Hawaii. *In re Marshall*, 1 U.S. D.C. Haw. 34 (1900); *In re Atcherley*, 3 U.S.D.C. Haw. 404, 421 (1909); *Soga* v. *Jarrett*, 3 U.S.D.C. Haw. 502, 506 (1910); *In re Curran*, 4 U.S.D.C. Haw. 730, 738 (1916). Other cases relying on the same principle are *United States* v. *Bower*, 4 U.S.D.C. Haw. 466 (1914); *Yeung* v. *Territory*, 132 F. 2d 374, 378 (C.A. 9th, 1942). The judicial pronouncement as to the relation between the territorial system of courts and the federal court in Hawaii is confirmed by the legislative history of the Hawaiian Organic Act.[5]

[5]Hawaiian Commission Message, Sen. Doc. No. 16, 55th Cong.,

d. The rule applicable in instant case

Since the rule applies to civil rights cases and in the relations between the territorial courts and the federal court in Hawaii, it was the duty of the District Court to dismiss petitioners' suit. Respondents have insisted on this defense from the outset of this case. However, in an endeavor to take the case out of the usual rule against collateral interference of a federal court in a pending non-federal criminal prosecution, petitioners, in the course of the hearings in the District Court, made numerous contentions attacking the respondent attorney general for bringing the criminal contempt proceeding and the respondent judge for entertaining it. (Footnote 6, pp. 5-6 of the petition and pp. 19-20 of petitioners' brief.) As held by the District Court and the Court of Appeals, their complaint alleged "no conspiracy or wrongful connection between the prosecution and the employer". The complaint simply attacks the sufficiency of the temporary restraining order, issued by the respondent judge, to sustain the pending criminal contempt charges. Said the Court of Appeals:

> "While the complaint alleges that the claimed unlawfulness of the injunction against picketing wrongfully will 'intimidate' appellants, it is apparent that if it be lawful, which is the question in issue, no such consequence will follow."
>
> (R. 387; 172 F. 2d 176, 177)

3d Sess., pp. 162-164; H. R. Rep. No. 305, p. 19, of Committee on Judiciary on H. R. 2972, 56th Cong., 1st Sess., which bill was later incorporated by the House into Sen. 222, the Hawaiian Organic Act (see H. R. Rep. No. 549, 56th Cong., 1st Sess.); 33 Cong. Rec. 1871, 1929, 1932-1934, 2025, 2123-2124, 2133, 2189, 2191-2194, 2388-2389, 2397, 2398-2400, 2441, 3771, 3801, 3859, 4358, 4649, 4733.

The Court of Appeals then held that such issue must be heard and decided in the criminal case.

Even if the complaint had alleged bad faith, such allegations would not have taken the case out of the usual rule against collateral interference in a criminal prosecution already brought where the state remedies have not been exhausted.[6] Similarly, allegations

[6]*Mooney* v. *Holohan*, 294 U.S. 103, allegations of knowing use of perjured testimony by prosecuting authorities and deliberate supression of rebutting testimony, applicant for writ of habeas corpus required to exhaust remedies in state courts; *Ex parte Hawk*, 321 U.S. 114, 116, similar; *East Coast Lumber Terminal, Inc.* v. *Town of Babylon*, 17 L. W. 2505 (C.A. 2d, April 5, 1949), aff'g 81 F. Supp. 701, allegations that enforcement against plaintiff of ordinance, claimed to be unconstitutional, was in a discriminatory, illegal and corrupt manner so as to destroy plaintiff's business allegedly competitive with business in which defendant, its attorney and officials were interested, application for injunction against enforcement of ordinance at time when criminal proceeding was pending in justice of the peace court and about to be removed to court of record for trial held, remedies in state courts must be exhausted; *Society of Good Neighbors* v. *Groat, supra*, 77 F. Supp. 695 (D.C.E.D. Mich., 1948), allegations that prosecuting attorney and judge, together with others, had entered into conspiracy to destroy plaintiff organization, that investigation by defendant judge acting as one-man grand jury was being illegally conducted, that statute on which investigation founded was unconstitutional, application for injunction denied, held, by analogy to habeas corpus cases, remedies in state courts must be exhausted. Most of the cases are habeas corpus cases, since attempts to quash criminal charges by injunction are uncommon. It is well established in such cases, in line with *Mooney* v. *Holohan* and *Ex parte Hawk, supra*, that allegations of bad faith do not excuse failure to exhaust state remedies. See *United States ex rel. Lesser* v. *Hunt*, 117 F. 2d 30 (C. A. 2d, 1941), holding petition considered in 34 F. Supp. 730 should not have been considered on the merits; *United States ex rel. Steele* v. *Jackson*, 171 F. 2d. 432 (C. A. 2d, 1948); *Sharpe* v. *Buchanan*, 121 F. 2d 448 (C. A. 6th, 1941), aff'g 36 F. Supp. 386, petition considered on the merits after state remedies exhaused, 135 F. 2d 974, pursuant to remand of this Court, 317 U. S. 238, petition denied, 142 F. 2d 213, cert. denied 322 U. S.

of discrimination do not excuse failure to exhaust state remedies.[7] Even when the criminal case arises in a federal court, such allegations of official misconduct are not a basis for collateral attack when they might have been urged by way of defense upon the trial and by appeal.[8]

The sugar strike was over when petitioners filed their complaint, and the case presents no application for protection against future interference with the continued enjoyment of lawful rights. The case is wholly unlike *Hague* v. *C.I.O.*, 307 U. S. 496[9], where

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75[8]; *Sweet* v. *Howard*, 155 F. 2d 715 (C. A. 7th, 1946), relating to alleged duress used by prosecutor in obtaining plea of guilty.

[7]*In re Wood*, 140 U.S. 278, 287, relating to alleged racial discrimination in the selection of a grand jury; *In re Shibuya Jugiro*, 140 U. S. 291, 298, similar; *Johnson* v. *Wilson*, 131 F. 2d 1 (C. A. 5th, 1942), cert. denied 316 U.S. 693, similar; *Hale* v. *Crawford*, 65 F. 2d 739 (C. A. 1st, 1933), cert. denied 290 U. S. 674, similar; *United States* v. *Brady*, 133 F. 2d 476, 481 (C. A. 4th, 1943), cert. denied 319 U.S. 746, similar; *Powell* v. *Meyer*, 147 F. 2d 606 (C. A. 3d, 1945), alleged denial of equal protection at petitioner's trial; *United States* v. *Snyder*, 160 F. 2d 351, 353 (C. A. 2d, 1947), alleged discrimination against negroes by parole board and in selection of jury. See *Virginia* v. *Rives*, 100 U. S. 313, relating to an application under the removal statute; cf. *Ex parte Virginia*, 100 U. S. 339, as to the criminal character of the abuse of power there involved; to the same effect, *Gibson* v. *Mississippi*, 162 U. S. 565, *Murray* v. *Louisiana*, 163 U. S. 101.

[8]*Young* v. *Sanford*, 147 F. 2d 1007 (C. A. 5th, 1945), cert. denied 325 U. S. 886; *Burall* v. *Johnson*, 134 F. 2d 614 (C. A. 9th, 1943), cert. denied 319 U. S. 768; *Dorsey* v. *Gill*, 148 F. 2d 857, 877 (C.A.D.C., 1945), cert. denied 325 U. S. 890.

[9]Cited and relied on by petitioners in their petition and brief, pp. 13, 16, 19. Other cases cited in petitioners' brief on this point are likewise distinguishable: *Board of Education* v. *Barnette*, 319 U. S. 624, *Terrace* v. *Thompson*, 263 U. S. 197, and *A. F. of L.* v. *Watson*, 327 U. S. 582, involved the question of relief against threatened prosecutions, as in the *Jeannette* case; *Truax* v. *Raich*, 239 U. S. 33, is explained in note 3 on page 19 of this brief. *Ex parte Royall*, 117 U. S. 241, is

it was alleged, and the court found, that meetings conducted in an orderly and peaceful manner were broken up by officials acting under the guise of law enforcement officers but whose real purpose was to remove the complainants' agents from the city, not to bring them before a court of justice. In the *Hague* case the purpose of the suit was to promote and protect the future exercise of lawful rights, and not, as here, to prevent the question of punishment of past acts from being lawfully adjudicated in the system of courts where there now lies, and did lie when the complaint herein was filed, a criminal prosecution based on such past acts.

Petitioners' contentions as to the invalidity of the restraining order, upon which the pending criminal prosecution in the territorial court is based, are properly the subject of defense in such prosecution. And, as pointed out by the Court of Appeals in its opinion (R. 385; 172 F. 2d 176, 177), should their contentions not be sustained and should they be tried and convicted, petitioners would have an adequate remedy at law by appeal to the Supreme Court of Hawaii and thereafter to the Court of Appeals. It is, therefore, respectfully submitted that petitioners' case was not within the equitable jurisdiction of the District Court.

3. The constitutionality of the order of the territorial court restricting picketing is sustained by the decisions of this Court.

Respondents believe that the determination of the question of whether the complaint sets forth a cause of action for injunctive relief is conclusive of this

one of the early cases in the line of habeas corpus cases establishing the rule of exhaustion of remedies.

case. Nevertheless, in view of petitioners' insistence upon their contention that the order of the territorial court is in contravention of the rights of free speech and peaceful assembly guaranteed by the First Amendment, respondents deem it desirable to submit a brief statement on the question of constitutionality. The question, then, is whether the order issued by respondent judge was in violation of the right of peaceful picketing which is derived from the First Amendment.

a. The applicable decisions

Respondents readily recognize the rule established in the cases cited on page 25 of petitioners' brief and other decisions of this Court in the same line, beginning with *Thornhill* v. *Alabama*, 310 U. S. 88. Likewise, petitioners concede that the rights of free speech and assembly are not unqualified rights but are subject to regulation in the public interest, and recognize the force of the dictum in the *Thornhill* case, 310 U. S. 88, 105, and the decision in *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287.[1] Since, on the one hand, petitioners rely on the general principle of the *Thornhill* case and respondents, on the other, rely on the exception thereto reserved by the dictum in that case and established in the *Drivers Union* case, the point at issue between the parties is as to which is the applicable line of authority.

Thornhill v. *Alabama*, *supra*, decided in 1940, was the first of the cases sustaining the right to picket on a constitutional basis. Upon an appeal from a conviction under an Alabama anti-picketing statute,

[1]Petitioners' brief, pp. 29-30.

the statute was held invalid because it was too broad, the statute having prohibited all picketing irrespective of the nature of the picketing, peaceful or otherwise. The picketing for which the defendant was prosecuted was of a peaceful nature and no violence was involved. This Court took pains, however, to point out that the right to picket is not an absolute, unqualified right:

> " . . . We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Founderies* v. *Tri-City Council*, 257 U. S. 184, 205. . . ."
>
> 310 U. S. 105.

It is significant that this Court qualified the right to picket in the very case in which the right was first given effect. And it was not long before the dictum became law, for the next case on the subject was *Drivers Union* v. *Meadowmoor Co.*, *supra*, decided the following year.

Like the *Thornhill case*, the *Drivers Union* case came to this Court through the state courts. The company filed a suit in equity in Illinois against the union to enjoin picketing of stores where the company's products were sold. A restraining order issued, enjoining all union conduct, peaceful as well as violent, and the case was referred to a master. The master found that considerable violence had occurred and recommended that all picketing be enjoined. The trial court enjoined only the violence and permitted peaceful picketing. Upon appeal, the state supreme court reversed the trial court and ordered that the injunc-

tion prohibit all picketing. Upon appeal, this Court affirmed the action of the state supreme court. The Court held that the states have power, by the use of equity powers vested in the courts, to prevent coercion, and where picketing has been enmeshed with violence, the courts have power to enjoin all picketing for such purpose. The Court also squarely held that the Constitution does not preclude the exercise of injunctive powers against picketing:

> ". . . Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct. . . .
>
> ". . . A state may withdraw the injunction from labor controversies but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club."
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> 312 U. S. 294-295

Unlike the *Thornhill* case, which related to the validity of a general statute, this case involved a specific injunction. The dictum of that case was nevertheless held to be equally applicable to an injunction as to a properly drawn statute:

> "(1) We do not qualify the *Thornhill* and *Carlson* decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on

free communication declared as the law of a state by a state court enjoys no greater protection here. *Cantwell* v. *Connecticut*, 310 U. S. 296; *American Federation of Labor* v. *Swing*, *post*, p. 321. But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, *Thornhill* v. *Alabama*, *supra*, so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the *Thornhill* opinion excluded from its scope. 'We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger . . as to justify a statute narrowly drawn to cover the precise situation given rise to the danger.' 310 U. S. 105. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved.

"(2) The exercise of the state's power which we are sustaining is the very antithesis of a ban on all discussion in Chicago of a matter of public importance. Of course we would not sustain such a ban. The injunction is confined to conduct near stores dealing in respondent's milk, and it deals with this narrow area precisely because the coercive conduct affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberty as Mr. Justice Cardozo. Compare *Nann* v. *Raimist*, 255 N. Y. 307; 174 N. E.

690. Such an injunction must be read in the context of its circumstances. Nor ought state action be held unconstitutional by interpreting the law of the state as though, to use a phrase of Mr. Justice Holmes, one were fired with a zeal to pervert . . . "

312 U. S. 297-298.

The *Drivers Union* case established beyond doubt that the right to picket is not an absolute or unqualified right, but that it may not only be regulated but even forfeited under certain circumstances. Subsequent decisions show that the right is subject to other limitations. Thus, where the purpose of the picketing is not legitimate, an injunction restraining peaceful picketing will likewise be upheld. *Carpenters Union* v. *Ritter's Cafe*, 315 U. S. 722 (1942): injunction against secondary picketing sustained; *Giboney* v. *Empire Storage Co.*, 336 U. S. 490 (1949): injunction against picketing to induce violation of state anti-trade-restraint law sustained.[3] Also indicating the qualified nature of the right to picket is *Allen Bradley Local* v. *Board*, 315 U. S. 740 (1942), wherein an order of the Wisconsin Employment Relations Board prohibiting mass picketing, threatening of employees desiring to work, obstructing points of ingress and egress and streets and highways, and picketing of employees' homes, was held not to be in conflict

[3]See also: *Fred Wolferman, Inc.* v. *Root*, 356 Mo. 976, 204 S. W. 2d 733 (1947), *cert. den.* 333 U. S. 837; *R. H. White Co.* v. *Murphy*, 310 Mass. 510, 38 N. E. 2d 685 (1942); *Saveall* v. *Demers*, 76 N. E. 2d 12 (Mass., 1947); *Markham & Callow* v. *International Woodworkers*, 170 Ore. 517, 135 P. 2d 727 (1943); *Swenson* v. *Seattle Central Labor Council*, 27 Wash. 2d 193, 177 P. 2d 873 (1947); *Retail Clerks' Union* v. *Wisconsin Employment Rel. Bd.*, 242 Wis. 21, 6 N. W. 2d 698 (1942).

with the Norris-LaGuardia Act and was sustained as a valid exercise of the state police power.

The *Drivers Union* case is, of course, the leading case on the effect of violence and other unlawful conduct on the right to picket. Following it are a substantial number of federal and state cases, including: *Carras* v. *Monaghan*, 65 F. Supp. 658 (D.C. Pa., 1946); *Steiner* v. *Long Beach Local*, 19 Cal. 2d 676, 123 P. 2d 20 (1942); *People* v. *Saff*[illegible] 74 Cal. App. 2d 967, 168 P. 2d 497 (1946); *Unite*[illegible]*ates El. Motors* v. *United E. R. & M. Workers*, [illegible]6 P. 2d 921 (L. A., Cal., Super. Ct., 1946); *Westinghouse Elec. Corp.* v. *United E. R. & M. Workers*, 139 N. J. Eq. 97, 49 A. 2d 896 (1946); *Isolantite* v. *United Elec., Radio and Mach. Workers*, 132 N. J. Eq. 613, 29 A. 2d 183 (1942); *Westinghouse Elec. Corp.* v. *United E. R. & M. Workers*, 353 Pa. 446, 46 A. 2d 16 (1946). See also: *Lassiter* v. *Swift & Co.*, 50 S. E. 2d 359 (Ga., 1948); *Weyerhaeuser Timber Co.* v. *Everett Dist. Council*, 11 Wash. 2d 503, 119 P. 2d 643 (1941); *New England Novelty Co.* v. *Sandberg*, 315 Mass. 739, 54 N. E. 2d 915 (1944); *Western Electric Co.* v. *Western Electric Emp. Ass'n.*, 137 N. J. Eq. 489, 45 A. 2d 659 (1946); *General Electric Company* v. *Andrew Peterson, et al.*, 61 N. Y. S. 2d 813 (1946); *General Electric Co.* v. *United E. R. & M. Workers*, 67 N. E. 2d 802 (Ohio C. P., 1946).

Petitioners seek to distinguish the *Drivers Union* case from the instant case on two grounds, first, that this case involves a mere temporary restraining order issued after an *ex parte* hearing while the injunction in the other case was issued after extended hearings, and secondly, that the background of this case does

not show violence of such scale, intensity or duration as was present in that case. As to the first, however, the opinion of this Court states that upon the filing of the suit for injunction in the *Drivers Union* case, "a preliminary injunction restraining all union conduct, violent and peaceful, promptly issued, and the case was referred to a master for report." 312 U. S. 287, 291. But even assuming that there was a distinction as to the nature of the proceedings upon which the respective orders in these cases were issued, respondents believe there is nothing in the First Amendment or in the decisions of this Court which supports such a distinction. Petitioners cite no authority for their contention. As to the other contention, respondents submit that it does not require window smashing, bombing, burning of stores and physical violence over a period of three or four years to move the protective hand of equity. Neither the dictum in the *Thornhill* case nor the decision in the *Drivers Union* case imposes such an outrageous test. Thus, the dictum in the *Thornhill* case is to the effect that "picketing *en masse* or otherwise conducted" which might occasion imminent and aggravated danger to the public peace or the privacy, lives or property of the inhabitants would justify a statute narrowly drawn to protect such intersets. The significance of the background of violence in the *Drivers Union* case lay in the coercive effect of the fear of future violence generated by the past violence. 312 U. S. 287, 294. The remedy of injunction is in nature preventive or protective. It is the character of the harm threatened, rather than that inflicted, which determines the exercise of the power. Respondents submit the rule of

the *Drivers Union* case is not a departure from the fundamental rule.

True, the right is not to be denied on slight or trivial grounds, "a trivial rough incident or a moment of animal exhurberance," 312 U. S. 287, 293. The findings upon which the order complained of in the instant case was issued, have been previously summarized on pages 4 and 13 of this brief. Both the territorial court, which heard the evidence, and the federal court, which reviewed the evidence, found that the company's property had been seized, that coercion and intimidation had occurred and that further serious and irreparable harm to property and disturbances of the public peace were threatened. (R. 173-174, 301-303; 338) Respondents submit that the order in this case is clearly sustained by the decisions of this Court.[3]

b. Other objections to order

So far as can be determined from the complaint, the constitutionality of the order is attacked merely on the general allegation that it is one "denying plaintiffs the free exercise of their right to picket peacefully". (R. 18-19) The complaint contains no specification of unconstitutionality. The general question of the power of courts to regulate picketing is not pressed in the petition. As noted above, petitioners

[3]In *Steiner* v. *Long Beach Local, supra,* 19 Cal. 2d 676, 123 P. 2d 20 (1942), the court stated that extreme physical violence was not necessary to bring a case within the rule. In *Westinghouse Elec. Corp.* v. *United E. R. & M. Workers, supra,* 139 N. J. Eq. 97, 49 A. 2d 896 (1946), the court held that factors other than violence, such as intimidation, coercion, duress, fraud and force, also operate to bar the right to picket.

concede that the rights of free speech and peaceful assembly are not unqualified, but are subject to regulation, and petitioners even recognize the rule of the *Drivers Union* case.[4] Petitioners, however, argue a number of more specific objections to the order on pages 26 to 35 of their brief. The objections that the order was issued "without hearing and without finding . . . of great and imminent danger to the state and public" (p. 26) are covered by the immediately preceding discussion in this brief. Petitioners also object to the limitation to three pickets at points of ingress and egress. In a dissenting opinion in the *Drivers Union* case, it is stated that the right to picket might, if necessary, be limited to even two or three. 312 U. S. 287, 319. From the cases cited on page 32 of this brief, it is clear that obstruction and interference with ingress and egress may be prevented by prohibiting mass picketing and by limiting the number of pickets at such points. The cases have varied as to the number to which pickets at points of ingress and egress have been limited. Since the reasonableness of the limitation is relative to the circumstances of the particular case, it is a question which the court issuing the order is in the best position to determine. *Drivers Union* v. *Meadowmoor Co.*, *supra*, 312 U. S. 287, 294. Petitioners further object that the order was too broad in that it covered the entire membership petitioners' union and the extensive property of the company, including company towns. It is apparent that a provision for preventing obstruction of

[4]Petitioners' brief, pp. 29-30.

access, for example, would not be effective unless it covered all who might take such action and all property to which access would be desired. The objection that the language of the order is vague and ambiguous is also lacking in substance. All such objections were presented to, and considered by, the District Court, which ruled that the order was valid. (R. 339; 74 F. Supp. 865, 876) Respondents submit that petitioners' objections to the order do not sustain their charge of unconstitutionality.

4. Petitioners are liable to prosecution for criminal contempt for violating the order of the territorial court regardless of the constitutionality of such order.

Respondents submit that under the decisions of this Court in *Howat* v. *Kansas*, 258 U. S. 181, and *United States* v. *United Mine Workers*, 330 U. S. 258, the merits of petitioners' complaint are entirely immaterial in determining whether they are entitled to relief and that the same considerations underlying those decisions (330 U. S. 258, 310-312) require that the pending criminal contempt proceeding in the territorial court be permitted to proceed without further restraint by the federal court.

CONCLUSION

Respondents respectfully submit that the petition presents no substantial reason for granting certiorari and that therefore the petition should be denied.

Dated: Honolulu, Territory of Hawaii, this 25th day of June, 1949.

Respectfully submitted,

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